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VIA U.S. MAIL

Sean Lev
General Counsel
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: Petition of TeleCommunication Systems, Inc. for Declaratory Ruling and/or
Rulemaking, GN Docket 11-117

Dear Mr. Lev:

This letter is being submitted on behalf of TeleCommunication Systems, Inc. ("TCS") in connection with the above-referenced proceeding. The purpose of this letter is to generally review the basis of the Federal Communications Commission's ("FCC" or "Commission") authority to regulate and prescribe requirements for the provision of 911/E911 services. More specifically, this letter will address the Commission's authority to adopt 911/E911 regulations requiring the owners or controllers of 911/E911 capabilities to make those capabilities available to CMRS providers and VPCs on a reasonable basis similar to the current requirement found in 47 C.F.R. § 9.7 regarding the provision of those capabilities to interconnected VoIP service providers.

Overview

Over the past twenty years, the Commission, relying on Titles I, II, and III of the Communications Act as well as Section 706 and various other Congressional authority, has made clear that it has broad authority to impose 911/E911 requirements

and based on this authority, has adopted numerous regulations governing 911, E911, VoIP, and NG911. During this period, the scope of the 911 and E911 requirements imposed by the Commission, as well as the entities to which these requirements apply, has grown dramatically in response to the Commission's need to address numerous technological issues in order to ensure the continued development of an effective nationwide 911/E911 emergency access system. Moreover, the Commission's mandate that the capacity for Automatic Location Identification ("ALI") be provided as part of 911/E911 service has remained constant. It is the mandate to provide this ALI capacity which had engendered the IP litigation, which lies at the center of TCS' instant Petition.¹

The Commission's basic authority to regulate and impose 911/E911 requirements stems from its fundamental purpose, which is to "promot[e] safety of life and property through the use of wire and radio communication."² In order to accomplish this responsibility, Congress equipped the Commission with broad authority to deal with public safety concerns in wire and radio communications, and also to regulate "'instrumentalities, facilities [and] apparatus' through which wire and radio services are provided."³

¹ TCS Petition for Declaratory Ruling and/or Rulemaking, GN Docket 11-117.

² *Revisions of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, 18681 (1996) (First E911 Report, Order and FNPRM); see 47 U.S.C. § 151; see *Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, 9 FCC Rcd 6170, 6171-72 (1994) (E911 Notice).

³ E911 Notice, 9 FCC Rcd 6170 at 6171-72.

As the Commission has often acknowledged, “911 and E911 services are the cornerstone of [the Nation’s] public safety communications infrastructure.”⁴ Almost twenty years ago, the Commission recognized that “the American public depends on 911 services in its emergencies,”⁵ “911 emergency services enable telephone users to receive, and state and local governments to provide, fast response to emergency situations.”⁶ The Commission has further recognized that E911 service “is critical to our nation’s ability to respond to a host of crises.”⁷ The Commission likewise affirmed that “it is difficult to identify a nationwide wire or radio communication service more immediately associated with promoting safety of life and property than 911.”⁸ Thus, the Commission concluded that the “broad availability of 911 and enhanced 911 services will best promote ‘safety of life and property through the use of wire and radio communication.’”⁹ Taking E911 to the 21st century, the Commission has indicated that Next Generation 911 (“NG911”) will “add incredible value to [this Nation’s] 9-1-1

⁴ *Facilitating the Deployment of Text to 911 and Other Next Generation 911 Applications; Framework for Next Generation 911 Deployment*, Notice of Proposed Rulemaking, PS Docket No. 11-153, 26 FCC Rcd 13615, 13687 (2011) (concurring statement of former Chairman Julius Genachowski). (Text to 911 NPRM).

⁵ E911 Notice, 9 FCC Rcd 6170 at 6171.

⁶ E911 Notice, 9 FCC Rcd 6170 at 6171.

⁷ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10246-47 (2005) (VOIP 911 Order), *aff’d Nuvio Corp v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

⁸ E911 Notice, 9 FCC Rcd 6170 at 6171.

⁹ E911 Notice, 9 FCC Rcd 6170 at 6171-72.

system and all the people who rely on it.”¹⁰ “Next Generation 911 is the emergency response system that will run on the broadband networks of the 21st century.”¹¹

The Commission has always taken the position that its authority to mandate the offering of ALI capacity in conjunction with the provision of 911/E911 service, and to set terms and conditions therefore, stem from its regulatory authority over wire and radio communications. It is the fact that the ALI capacity mandate falls within the ambit of the FCC’s authority over wire and radio communications that serves as the basis for TCS’ request for guidance and/or an amendment of the rules.¹²

Commission and Judicial Precedent

As previously noted, the FCC first raised the question of its authority to impose E911 requirements in 1994. At that time, the FCC initiated a rulemaking proposal to amend its regulations to address issues raised by the provision of 911 and E911 services through certain telecommunications technologies.¹³ The Commission’s primary objective was to ensure broad availability of 911 and E911 services “to users of the

¹⁰ Text to 911 NPRM, 26 FCC Rcd 13615 at 13687 (concurring statement former Chairman Julius Genachowski).

¹¹ Text to 911 NPRM, 26 FCC Rcd 13615 at 13687 (concurring statement of former Chairman Julius Genachowski).

¹² In the Petition, TCS seeks guidance (a) that, based on § 9.7 and § 20.18 of the Rules and Commission precedent, the provision of wireless 911, E911, and NG911 location-based services are in furtherance and fulfillment of a stated Government policy; (b) that the Commission is now aware that its stated policy may require application of a patent if an E911 services provider is to comply with FCC regulations; and (c) that 911, E911, and NG911 location-based services are used with the authorization or consent of the Government. In the alternative, TCS has requested that the Commission expand its Rules by amending § 9.7 and § 20.18 to provide that owners or controllers of capabilities that can be used for 911 and E911 service (and in the future NG911 service) must make those capabilities available at fair, reasonable, and nondiscriminatory (“FRAND”) rates, terms, and conditions not only to interconnected VoIP providers, but also to CMRS providers and those 911 and E911 services providers providing them with the underlying service. TCS Comments at 2-3.

¹³ E911 Notice, 9 FCC Rcd 6170 at 6170.

public switched telephone network (PSTN) whose health and safety may depend on 911 emergency services....”¹⁴ More specifically, the FCC intended to ensure that the effective operation of 911 services was “not compromised by new developments in telecommunications.”¹⁵ In order to accomplish this, the Commission, *inter alia*, proposed that commercial mobile radio services (CMRS) carriers include ALI and Selective Routing (SR) features in their real time voice services.¹⁶ In asserting its authority to do so under 47 U.S.C. § 151, § 153 (a), (b), Titles II and III of the Communications Act, the Commission stated:

Congress created the Federal Communications Commission ‘for the purpose [among others] of promoting safety of life and property through the use of wire and radio communication...’ Commission has jurisdiction to license the electromagnetic spectrum and also regulate ‘instrumentalities, facilities [and] apparatus’ through which wire and radio services are provided. It is difficult to identify a nationwide wire or radio communication service more immediately associated with promoting safety of life and property than 911. We believe that broad availability of 911 and enhanced 911 services will best promote ‘safety of life and property through the use of wire and radio communication.’¹⁷

The Commission first affirmed this as the basis for its imposition of E911 requirements in its 1996 *E911 First Report and Order* where, in adopting the original E911 rules, the FCC cited its statutory mandate to promote the safety of life and

¹⁴ E911 Notice, 9 FCC Rcd 6170 at 6170.

¹⁵ E911 Notice, 9 FCC Rcd 6170 at 6170.

¹⁶ E911 Notice, 9 FCC Rcd 6170 at 6171.

¹⁷ E911 Notice, 9 FCC Rcd 6170 at 6171-72.

property through the “use of wire and radio communication.”¹⁸ The adoption of such rules was important to “improving the quality and reliability of 911 services available to wireless callers.”¹⁹ Further, in so doing the FCC acknowledged that it had an ongoing obligation to “ensure that reasonable requirements and incentives are in place to facilitate the application of this [ALI] technology to improve wireless 911 services.”²⁰

From that point forward, it has been the FCC’s position that the provision of 911/E911 services, and later the provision of E911 capabilities, fell within the ambit of “wire and radio communication” and that it had broad authority in this area. For example in the *Text to 911 NPRM*, the Commission, in connection with its authority stated that:

[W]e believe that the Commission would also have ancillary authority to regulate certain entities over which (or over whose actions at issue) we may not have express regulatory authority. Under Section 4 (i) of the Communications Act and the judicial precedent recognizing the Commission’s ancillary authority, the Commission is empowered to impose requirements when it lacks specifically enumerated authority, provided its actions fall within the agency’s general grant of jurisdiction over ‘interstate and foreign communication by wire or radio’ and the regulation is reasonably necessary to effectuate the Commission’s responsibilities under the Act and rules promulgated pursuant to the Commission’s express authority.²¹

Moreover, from the beginning the Commission has recognized that ALI was integral to achieving its Congressionally-mandated 911/E911 goals, as well as the need for it to incorporate technological developments in evolving 911/E911 requirements so

¹⁸ First E911 Report, Order and FNPRM, 11 FCC Rcd 18676 at 18681.

¹⁹ *Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling System*, 12 FCC Rcd 22665, 22669 (1997) (E911 Reconsideration Order).

²⁰ First E911 Report, Order and FNPRM, 11 FCC Rcd at 18681-82.

²¹ *Text to 911 NPRM*, 26 FCC Rcd 13615 at 13663.

as to ensure the continuing evolution of E911 service. In adopting the original E911 rules “[o]ne of the Commission’s principal objectives ... was to make sure that ongoing processes are in place that will make technological advances available to 911 service providers....”²² The Commission required the carriers not just to deliver 911 calls to emergency dispatchers but also to provide E911 service, including ALI.²³ The ALI mandate has remained constant and the FCC has never questioned its authority to prescribe ALI-related rules pursuant to its regulatory authority over wire and radio communications.

Subsequent to the Commission’s adoption of the *E911 First Report and Order*, Congress reaffirmed the FCC’s broad authority with regard to imposing E911 requirements when it enacted the Wireless Communication and Public Safety Act (911 Act) “to promote and enhance public safety through the use of wireless communication services” and establish 911 as the universal emergency telephone number for the nation.²⁴ Congress took this step because it had found that “improved public safety remains an important public objective of federal, state, and local governments and substantially facilitates interstate and foreign commerce.”²⁵ Congress directed that the Commission “consult and cooperate with state and local officials in its role of encouraging and supporting the deployment of comprehensive end-to-end emergency communications.”²⁶

On August 24, 2000, acting pursuant to its statutory mandate to implement the 911 Act, the Commission designated 911 as the universal emergency assistance number for wireless and wireline calls and established transition periods for areas in which 911

²² First E911 Report, Order and FNPRM, 11 FCC Rcd 18676 at 18682-83.

²³ First E911 Report, Order and FNPRM, 11 FCC Rcd 18676 at 18689-18723.

²⁴ VoIP 911 Order, 20 FCC Rcd 10245 at 10250; *see* Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999) (911 Act); *see* 47 U.S.C. § 251(e).

²⁵ *Revisions of the Commission’s Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Report and Order and Second FNPRM, 18 FCC Rcd 25340, 25345-25346 (2003) (E911 Report and Order and Second FNPRM).

²⁶ VoIP 911 Order, 20 FCC Rcd 10245 at 10250.

is not in use as an emergency telephone number.²⁷ The Commission cited Sections 1, 4(i), 4(j), 7, 10, 201, 202, 208, 214, 251(e)(3), 301, 303, 308, 309(j) and 310 of the Communications Act as the legal basis for its proposed rules.²⁸

In 2003, in the course of expanding the breadth of its E911 requirements to include additional technologies and services, the Commission had occasion to review its authority under both the Communications Act and the 911 Act. In so doing, it stated that “[w]e find that Congress has given the Commission broad authority to deal with public safety concerns in wire and radio communications...In recognition of the role we are to play, along with state and local governments, we find we have jurisdiction to adopt 911 rules for both wire and radio communications.”²⁹

In its *VoIP 911 Order*, the Commission specifically concluded that it had ancillary authority under Title I, as well as its plenary numbering authority under § 251 (e) of the Act, to impose E911 requirements.³⁰ Based on sections 1 and 2(a) of the Act,³¹ and the definitions set forth in section 3(33) (“radio communication”)³² and section 3(52) (“wire communication”),³³ the Commission concluded that interconnected VoIP is covered by the Commission’s general jurisdictional grant.³⁴

The Commission then determined that imposing a E911 requirements on interconnected VoIP service providers was reasonably ancillary to the effective performance of its various responsibilities because it has a statutory obligation to make

²⁷ VoIP 911 Order, 20 FCC Rcd 10245 at 10259; *see* Implementation of the 911 Act, The Use of N11 Codes and other Abbreviated Dialing Arrangements, CC Docket No. 920105 and WT Docket No. 00-110, *Fourth Report and Order and Third Notice of Proposed Rulemaking, and Notice of Proposed Rulemaking*, 15 FCC Rcd 17079, 17079. (2000) (Fourth Report and Order and Third NPRM).

²⁸ Fourth Report and Order and Third NPRM, 15 FCC Rcd 17079 at Ordering Clause 39.

²⁹ E911 Report and Order and Second FNPRM, 18 FCC Rcd 25340 at 25345-46.

³⁰ VoIP 911 Order, 20 FCC Rcd 10245 at 10261.

³¹ 47 U.S.C. § § 151, 152(a).

³² 47 U.S.C. § 153(33).

³³ 47 U.S.C. § 153(52).

³⁴ VoIP 911 Order, 20 FCC Rcd 10245 at 10261; 47 U.S.C. § 151.

available “a rapid, efficient, nationwide, and worldwide wire and radio communication service . . . for the purpose of promoting safety of life and property through the use of wire and radio communication.”³⁵ In light of this statutory mandate, promoting an effective nationwide 911/E911 emergency access system has become one of the Commission’s primary public safety responsibilities under the Act.³⁶ Moreover, the Commission declared that its authority to require network changes to provide the E911 features central to the 911 infrastructure, is part of Congress’ directive to the Commission to require the establishment of 911 as a “universal emergency telephone number...”³⁷

In the *Nuvio* case (upholding the *VoIP 911 Order*), the FCC’s broad authority with regard to the imposition of 911/E911 requirements in fulfillment of its statutory mandate was confirmed:

Congress established the FCC in part “for the purpose of promoting safety of life and property through the use of wire and radio communications.” 47 U.S.C. § 151. Through the Wireless Communications and Public Safety Act of 1999, Congress charged the FCC with ensuring that 911 service is available throughout the country. Pub. L. No. 106-81, 113 Stat. 1286 (codified at scattered sections of 47 U.S.C.). The Act instructs that “[t]he Commission . . . shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance.” 47 U.S.C. § 251(e)(3). Five years later, Congress enacted the ENHANCE 911 Act. Pub L. No. 108-494, 118 Stat. 3986 (2004) (codified at 47 U.S.C. § 942). In that Act, Congress found that “for the sake of our Nation’s homeland security and public safety, a universal emergency telephone number (911) that is enhanced with the most modern and state-of-the-art telecommunications capabilities possible should be available to all citizens in all regions of the Nation.”

³⁵ VoIP 911 Order, 20 FCC Rcd 10245 at 10262 and 10266.

³⁶ VoIP 911 Order, 20 FCC Rcd 10245 at 10262.

³⁷ VoIP 911 Order, 20 FCC Rcd 10245 at 10266.

Congress made clear that “enhanced 911 is a high national priority.”³⁸

In its *NET 911 Order*, the Commission once again broadened both the scope of its E911 requirements and the entities to which these requirements applied. In this Order, the Commission implemented the key provisions of the New and Emerging Technologies (NET) 911 Improvement Act of 2008 (NET 911 Act”).³⁹ The NET 911 Act was designed “to promote and enhance public safety by facilitating the rapid deployment of IP-enabled 911 and E911 service, encourage the Nation’s transition to a national IP-enabled emergency network, and improve 911 and enhanced 911 access to those with disabilities.”⁴⁰

In a further expansion of the scope of its E911 requirements, the Commission adopted Section 9.7 of the rules which now requires that an owner or controller of a capability that can be used for 911/E911 service must provide such a capability to an interconnected VoIP provider on reasonable rates, terms, and conditions.⁴¹ This provision applies to “any” entity that owns or controls the capabilities and not just to the carriers typically regulated by the Commission.⁴² The FCC noted that “Congress understood that capabilities might be available from multiple sources and intended a

³⁸ *Nuvio Corp. v. FCC*, 473 F. 3d 302, 311 (D.C. Cir. 2006) (Kavanaugh concurring).

³⁹ New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. No. 110-283, 122 Stat. 2620, Preamble (NET 911 Act) (amending 911 Act); see *In the Matter of Implementation of the Net 911 Improvement Act of 2008*, WC Docket No. 08-171, 23 FCC Rcd 15884, 15885 (2008) (NET 911 Order).

⁴⁰ NET 911 Order, 23 FCC Rcd 15884 at 15885.

⁴¹ NET 911 Order, 23 FCC Rcd 15884 at 15885; 47 C.F.R. § 9.7.

⁴² NET 911 Order, 23 FCC Rcd 15884 at 15896.

broad interpretation of the scope of ‘entities’ obligated to provide access to capabilities.”⁴³ The Commission went on to state that:

We recognize that in some instances, multiple entities may have ownership or control of similar capabilities in the same local area. We see nothing in the NET 911 Act to suggest that only certain of those entities would have the obligation to provide access. Indeed, if some but not all entities had that obligation, disputes would certainly arise over which entities were subject to the [NET 911] Act, causing delays in granting interconnected VoIP providers access and thwarting Congress’s ultimate goal of ‘facilitating the rapid deployment of IP-enabled 911 and E911 services.’⁴⁴

In its *NET 911 Order*, the FCC has defined the capabilities to which § 9.7 applies as including, among other things, those items used by wireless providers in the provision of 911 and E911 services such as:

the Selective Router; the trunk line(s) between the Selective router and the PSAP(s); the ALI database; the SR database; the DBMS; the MSAG; p-ANIs; ESNs; mobile switching center capabilities; shell records; the data circuits connecting these elements; *and the network elements, features, processes, and agreements necessary to enable the use of these elements.*[emphasis added]⁴⁵

This definition clearly includes IP agreements pertaining to the features and processes necessary to provide ALI capabilities.

With regard to the rates to be charged for these capabilities, the Commission found that “issuing rules of general applicability regarding rates, terms and conditions best fulfills the goals of the NET 911 Act” and, as a result, specified “that those rates,

⁴³ NET 911 Order, 23 FCC Rcd 15884 at 15896.

⁴⁴ NET 911 Order, 23 FCC Rcd 15884 at 15896-97 (footnote omitted).

⁴⁵ NET 911 Order, 23 FCC Rcd 15884 at 15896 (footnote omitted) (emphasis added).

terms, and conditions must in all instances be reasonable.”⁴⁶ Of particular note in this instance is the fact that the Commission went on to hold that [i]f an owner or controller of a capability required to be made available does not currently make that capability available to any other entities, the rates, terms and conditions under which that owner or controller must provide access to a requesting interconnected VoIP service provider must be reasonable, and should be reached through commercial negotiation.”⁴⁷

Basis for Commission Action

TCS submits, based on past precedent, express and implied Congressional authority, and the arguments previously detailed by TCS in this proceeding, that the FCC has broad authority to impose E911 requirements on various entities, including those that it does not traditionally regulate, pursuant to its statutory authority to promote an effective nationwide 911/E911 emergency access system. This authority is based on Titles II and III as well as the Commission’s ancillary authority under Title I. Congress has clearly established the goal that 911/E911 technology be deployed as rapidly and as ubiquitously as possible in order “to promote an effective nationwide 911/E911 emergency access system by recognizing the needs of the public safety community to get call back and location information.”⁴⁸ Likewise, the Commission has authority to take the steps necessary to facilitate this result.

One of the steps that the Commission may take is to issue non-binding guidance with regard to an issue which touches a subject matter under its jurisdiction, *i.e.*

⁴⁶ NET 911 Order, 23 FCC Rcd 15884 at 15897 (emphasis in the original footnote omitted).

⁴⁷ NET 911 Order, 23 FCC Rcd 15884 at 15899.

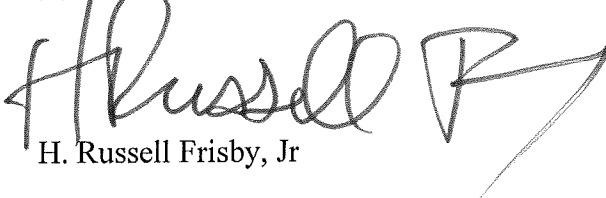
⁴⁸ VoIP 911 Order, 20 FCC Rcd 10245 at 10266.

compliance with the Commission's mandate to offer ALI capacity in connection with the provision of 911/E911 service.⁴⁹ This is particularly the case when one of the fundamental issues is whether the provision of wireless 911, E911, and NG911 ALI services are in furtherance and fulfillment of Commission policy.

In the alternative, acting under its ancillary authority, as well as its broader statutory purpose (which predates and is in addition to its charge under the NET 911 Act), the FCC can and should require E911 capabilities be made available to CMRS providers and VPCs on a reasonable and non-discriminatory basis. The Commission has already recognized that it must require that all owners and controllers of such E911 capabilities make those capabilities available to interconnected VoIP service providers on a reasonable basis so as to avoid deployment delays which would thwart Congress's goal. Using the same reasoning, the FCC should require that these E911 capabilities be made available on the same terms to CMRS providers and VPCs.

Sincerely,

Stinson-Morrison Hecker LLP

A handwritten signature in dark ink, appearing to read "H. Russell Frisby, Jr.", with a stylized flourish at the end.

H. Russell Frisby, Jr

HF:SMH

⁴⁹ See e.g. TCS Reply Comments at 6. According to the Administrative Conference of the United States ("ACUS"):

"[p]olicy statements that inform agency staff and the public regarding agency policy are beneficial to both. While they do not have the force of law (as do legislative rules) and therefore can be challenged within the agency, they nonetheless are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy." Administrative Conference of the United States, Recommendation 1992-2, Agency Policy Statements, at 1 (Adopted June 18, 1992).

Sean Lev
August 7, 2013
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cc: Stephanie Weiner
David Senzel
Eric Schmidt